

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

No. 77-6111

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6111

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
SOUTH END EDUCATION COMM'TTEE, et al.,
Plaintiff-Intervenor-Appellee,
v.
BOARD OF EDUCATION OF WATERBURY,
CONNECTICUT, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the
District of Connecticut

BRIEF OF THE UNITED STATES

RICHARD BLUMENTHAL
United States Attorney

DREW S. DAYS III
Assistant Attorney General

THOMAS M. KEELING
LEIGH M. MANASEVIT
Attorneys
Department of Justice
Washington, D. C. 20530

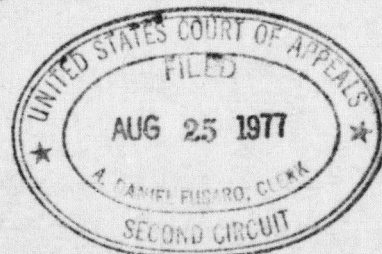


TABLE OF CONTENTS

	<u>PAGE</u>
QUESTION PRESENTED	1
STATEMENT	1
Background	1
Facts	3
Decision of the Court Below	4
ARGUMENT	6
CONCLUSION	12

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Davis v. Board of School Commissioners,</u> 402 U.S. 33 (1971)	6
<u>Dayton Board of Education v. Brinkman,</u> U.S. <u> </u> 97 S.Ct. 2766 (1977)	7,8
<u>Hart v. Community School Board,</u> 512 F.2d 37 (C.A. 2, 1971)	8,12
<u>Keyes v. School District No. 1,</u> 413 U.S. 189 (1973) . .	7
<u>King Seeley Thermos v. Aladdin Ind., Inc.,</u> 418 F.2d 31 (C.A. 2, 1969)	10
<u>Lee v. Macon County Board of Education,</u> 448 F.2d 746 (C.A. 5, 1971)	12
<u>Pasadena v. Board of Education v. Spangler,</u> 427 U.S. 424	10
<u>Swann v. Board of Education,</u> 402 U.S. 1 (1971)	7,11
<u>System Federation v. Wright,</u> 364 U.S. 642 (1961) . . .	7,8,10
<u>United States v. Swift & Co.,</u> 286 U.S. 106 (1932) . . .	9
<u>United States v. Texas Education Agency,</u> 467 F.2d 848 (C.A. 5, 1972)	12
<u>Washington v. Davis</u> 426 U.S. 229 (1976)	9
<u>Wright v. Council of the City of Emporia,</u> 407 U.S. 451 (1972)	9
 <u>OTHER AUTHORITIES</u>	
Rule 53 Federal Rules of Civil Procedure	4

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6111

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
SOUTH END EDUCATION COMMITTEE, et al.,
Plaintiff-Intervenor-Appellee,
v.
BOARD OF EDUCATION OF WATERBURY,
CONNECTICUT, et al.,
Defendants-Appellants.

On appeal from the United States District Court for the
District of Connecticut

BRIEF OF THE UNITED STATES

QUESTION PRESENTED

Did the Trial Court abuse its discretion by ordering the implementation of Amicus Plan C to desegregate three Waterbury elementary schools rather than plans proposed by the Defendant Board of Education?

STATEMENT

Background

This is a school desegregation case. It was commenced in 1969 when the United States filed a complaint alleging

purposeful discrimination by the Defendants against minority school students in the operation of the public schools of the City of Waterbury. Although the defendants denied the allegations of the complaint, they voluntarily entered into a consent order in June, 1973 (App. p. 7).

The Consent Order had attached to it a comprehensive desegregation plan called Attachment A (App. p. 14). It was agreed in the Consent Order that while implementation of the Attachment A plan was not required, the implementation of that plan would effectively desegregate the schools of Waterbury. (App. p. 10). However the Consent Order further provided that the Board of Education could implement, if it desired, any equally effective desegregation plan. (App. p. 10, 12). This present dispute arises as a result of the Board of Education's petitions to the District Court to implement plans other than that attached to the Consent Order. Those alternative plans affect three schools, Barnard, Duggan and the predominantly Puerto Rican Maloney school. 1/ The plans are "Plan H" (App. p. 31), "Plan H (updated April, 1975)" (App. p. 49), and "December 1976 Plan H update" (App. p. 78). The three versions of Plan H are nearly identical and all propose

1/ The enrollments of these three schools in 1976-1977 were Barnard 210 students (11% minority); Duggan 134 students (39% minority); Maloney 203 students (87% minority).

to desegregate the predominantly hispanic Maloney school by closing it or reducing its size and reassigning its students to the predominantly Anglo Barnard or Duggan schools.

The District Court found this method of desegregating the Maloney school unduly burdensome to the Hispanic community and on September 1, 1976 enjoined the Board to devise an alternative method of desegregation in order to comply with the Consent Order. (App. p. 65, 76). The failure of the Board of Education to comply with the Consent Order and the further Orders of the Court as they affect the Maloney, Barnard and Duggan schools led the District Court to order the Board to implement a desegregation plan. That order gave rise to this appeal.

The United States agrees that the procedural history of this case as set out in the appellants' statement is substantially accurate. Accordingly the procedural history is not repeated in our statement. Brief sections summarizing the relevant facts and the decision of the Court below are set out, however, to supplement the appellants' statement.

Facts

As appellants note in their statement (Def. Brief, p. 3), the consent order provided that "the results projected [under Attachment A to the consent order]... were to serve as a guide in determining whether the final plan substantially conformed to requirements of the Consent Order." As to the three schools involved in this appeal -- Barnard, Duggan, and

Maloney -- Attachment A to the consent order called for the closing of all three schools and the reassignment of the students to a renovated facility at the Croft school ^{2/} with the result that the student composition there would be 42% minority.

The three schools are geographically near each other and the Magistrate found them to be "relatively closely grouped." (April 28, 1977 Report, App. p. 183, 186.) No non-special education students are transported to Duggan or Maloney while 69 out of 210 students were transported to Barnard during 1976-1977.

Decision of the Court Below

On June 10, 1977 the District Court entered an Order approving and concurring in the Magistrate's April 28, 1977 Report on remedial plans for the desegregation of the Barnard, Duggan and Maloney schools. (App. p. 210) Rule 53 Fed. R. Civ. P. That Order is the subject of this appeal.

The Magistrate's report considered the following plans:

- Defendants' Attachment A or freedom of choice plan. ^{3/} This plan treats Barnard, Duggan and Maloney as one zone and permits freedom of choice transfers among the schools.
- Amicus Plan C. This plan called for closing the Duggan school and reassigning the students to Maloney and Barnard.

^{2/} Croft school was located on the periphery of the Puerto Rican Community. (App. p. 87)

^{3/} All versions of Plan H had been withdrawn by the Defendants. (App. p. 189). This Attachment A is different from Attachment A to the Consent Order. For purposes of clarity this plan will be referred to as the freedom of choice plan.

- The Buford Plan. This plan, proposed by the United States, called for closing the Barnard school and reassigning the students to Duggan and Maloney.

The Report compared the Amicus Plan C, the Government's Buford Plan and the Defendants' freedom of choice Plan and concluded that while an attempt at freedom of choice should be permitted, a back-up plan should be decided upon in the event freedom of choice was unsuccessful. In making the determination that a back-up plan had to be chosen then, the Master relied upon the judgment of defendants' counsel that,

This case has been pending far too long to permit the risk of another lost school year posed by simply leaving defendants to consider back-up plans for the first time at summer's outset if the suggestion now offered has by then proved inadequate . . . (App. p. 197.)

The Master considered that, absent a default, the responsibility for the creation of a back-up plan would be the defendants' in the first instance. (App. p. 197-198.) However, the Master concluded that

[t]he situation presented certainly verges on default . . . [and] for defendants to start up a contingency plan from scratch even now is probably too late. . . . (App. p. 198.)

Accordingly, the Master, after weighing the relative merits of Amicus Plan C and the Buford Plan, chose Amicus Plan C as the back-up plan.

On June 10, 1977, when the District Court approved and concurred in the Magistrate's ruling on remedial plans of April 28, 1977 and directed defendants to take immediate steps to have the plan fully operative by September 7, 1977, the Court had been informed at a hearing that day that the

freedom of choice plan had failed. (App. p. 210.) The June 10 Order, in adopting the Master's Report, rejected the defendants' Plan Z, a plan presented on June 9 and, therefore, not available to the Master when the April 28 Report was written. Plan Z was a plan proposed by the Board of Education on June 9, one day before this hearing. That plan purported to deal in specific numbers. However its success depended upon volunteers and mandatory reassignments and it contained no procedures for attracting or even soliciting volunteers or for making mandatory reassignments. (June 10, 1977 transcript pp. 19-21 R. Vol. XI)

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING IMPLEMENTATION OF AMICUS PLAN C.

In June, 1973, the Defendants in this action voluntarily undertook the responsibilities embodied in the June 1973 Consent Order which requires them to

devise, adopt, and implement a student assignment plan. . .which will achieve the greatest amount of desegregation possible considering the practicalities, and shall be implemented in such a manner that the burden of desegregation does not fall more heavily upon students of one race or national origin than upon students of another race or national origin.

(App. p. 11). Cf. Davis v. Board of School Commissioners, 402 U.S. 33, 37 (1971). This appeal of the order of the Court below, whether that order is considered as an interpretation of a consent order or as an exercise of the power to fashion a remedy for a school board's default of its obligation to desegregate unlawfully segregated schools, involves a review

of a decision where the district courts have broad discretion. See, System Federation v. Wright, 364 U.S. 642, 648 (1961), and Swann v. Board of Education, 402 U.S. 1, 16. (1971).

Defendants appear to question the authority of the court below to require them to formulate any remedial plan on the basis that "[a] federal remedial power may be exercised only on the basis of a constitutional violation." (Def. Brief at 11). But the complaint of the United States initiating this suit plainly alleged purposeful discrimination by the defendants resulting in systemic segregation of the elementary schools. (App. 1). Thus, the predicate was established for proof of a constitutional violation calling for a systemwide remedy -- Keyes v. School District No. 1, 413 U.S. 189 (1973); Dayton Board of Education v. Brinkman. U.S. 97 S. Ct. 2766 (1977). Therefore, defendants' statement of the law, while correct, does not govern the situation of these defendants who, for whatever reasons, voluntarily settled a lawsuit alleging a system-wide constitutional violation and agreed to a Consent Order imposing certain responsibilities, including system-wide desegregation of the elementary schools. In this situation, the federal, judicial authority arises from the Court's authority to enforce a Consent Order.

Firmness and stability must no doubt be attributed to continuing injunctive relief based upon adjudicated facts and law, and neither the plaintiff nor the court should be subject to the unnecessary burden of reestablishing what has once been decided. System Federation v. Wright, supra, 647.

For this reason the policies of res judicata apply to Consent Orders, System Federation v. Wright, supra, 364 U.S. at 646, and, therefore, no proof of an independent constitutional violation is required here to enforce the terms of the consent order.

The Consent Order in this case by its terms reflects an undertaking by the Defendants to formulate an effective desegregation plan. Accordingly, their compliance should be measured by the terms of the Consent Order, without regard to the element of intent either with respect to past actions (a matter which was settled by entry of the Consent Order) or with respect to the remedies proposed (a matter on which the Consent Order does not condition the required results). While intent is unquestionably an element of a constitutional violation, Dayton Board of Education v. Brinkman, supra; Hart v. Community School Board, 512 F.2d 37 (C.A. 2, 1975), it is not the measure of compliance with this

Consent Order which is silent on that subject, 4/ anymore than it is the measure of compliance with a litigated desegregation order. Wright v. Council of the City of Emporia 407 U.S. 451 (1972); recently affirmed by Washington v. Davis, 426 U.S. 229 (1976).

4/ It is not clear whether Defendants are seeking to modify the Consent Order. However if they are seeking a modification they must first attempt to show to the District Court a change of law or circumstance so as to warrant such a change.

"There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief. Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided. Nevertheless the court cannot be required to disregard significant changes in law or facts if it is "satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." United States v. Swift & Co., Supra, at 114-115. A balance must thus be struck between the policies of res judicata and the right of the court to apply modified measures to changed circumstances.

Where there is such a balance of imponderables there must be wide discretion in the District Court. But discretion is never without limits and these limits are often far clearer to the reviewing court when the new circumstances involve a change in law rather than facts."

(Footnote continues on next page.)

Recognizing the Consent Order obligation, achieving the "greatest amount of desegregation possible considering the practicalities", is not a phrase of precise definition, the parties, in order to avoid later difficulties in interpretation of the phrase, agreed in the Consent Order to what its meaning would be. Paragraph seven of the Order provides, pertinently,

7. While the specific zone lines and utilization of buildings proposed in Attachment A hereto, are not required, the results projected under the plan. . . shall serve as guides in determining whether the final plan substantially conforms to paragraph 1, above. (App. p. 12)

Attachment A to the Consent Order provided that the Maloney students would be housed, with others, in the renovated Croft building with a 42% minority student body. (App. p. 27)

(Footnote continued from previous page.)

System Federation v. Wright, supra, 364 U.S. at 648-649. While we do not believe that there are changed circumstances of either law or fact such as to warrant modification, it is clear that the appropriate procedure is to first seek such relief in the District Court. Defendants have failed to do this and accordingly should not be permitted to seek such a modification in this Court. Cf. Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976).

Alternatively, a Court decree may be modified where it is necessary to "achieve the results intended" by the decree. King Seeley Thermos v. Aladdin Ind., Inc., 418 F.2d 31 (C.A. 2, 1969). A modification on this ground should also be sought in the District Court and, in any event, there is no evidence that it is necessary to modify this Order to achieve the results intended.

The Master found that the defendants, as of April 28, 1977 had not come forward with a plan that had any promise of success in achieving this result. (App. p. 196). However, even against this finding and, further, the finding that the situation verged on default (App. p. 198), the Master and the District Court permitted a trial of the freedom of choice plan and, only after that test showed the plan to be ineffective, did the Court order a plan other than the one chosen by the School Board. (App. p. 210). At this point it was clearly appropriate for the Court to find that the school authorities had fulfilled their responsibilities to desegregate and, that judicial action was appropriate. Swann v. Charlotte-Mecklenburg, supra, 402 U.S. at 15-16 (1971). The Master chose among the plans then before him and decided which one most nearly conformed to the Consent Order obligation. The defendants' counsel had already conceded that a contingency plan would have to be chosen at that time in order to be effective for the following year and that the

'case has been pending far too long to permit the risk of another lost school year posed by simply leaving defendants to consider back-up plans for the first time at summer's outset' (App. p. 197)

It is therefore difficult to understand Defendants present position that the Court erred in rejecting Plan Z, a plan never presented to the special master and only presented to the Court one day before June 10, the day of the hearing on the Master's Report.

Further, Plan Z was presented in a very tentative manner. The plan itself states that it "may reflect a new statement of position by . . ." the Board of Education. (App. p. 209) (*italics in original*). Plan Z relies in part on volunteers and mandatory transfers. Yet it has no provision for assuring the availability of volunteers or for choosing the mandatory transfers (June 10, 1977 hearing R. Vol. XI). Whether Plan Z was rejected by the District Court because it was presented too late to test its probability of success or, alternatively, because the Court felt it had little probability of success, neither of these conclusions appear erroneous on the record and either would support the rejection of Plan Z.

On the question of burden, the requirement that a desegregation plan not unduly burden one racial or ethnic group is a requirement of any desegregation plan. Hart v. Community School Board, supra, 512 F.2d at 53; United States v. Texas Educational Agency, 467 F.2d 848 at 871-872 (C.A. 5, 1972); Lee v. Macon County Board of Education, 448 F.2d 746, 753-754 (C.A. 5, 1971). This requirement, like the obligation to desegregate, was voluntarily assumed by the defendants and by its terms applies without regard to intent. The Defendants offer no reason why an intent element should be added to the Consent Order and accordingly the Court below was correct in analyzing the plans before it without regard to the element of intent.

CONCLUSION

For the foregoing reasons the United States urges this Court to affirm the Order of the District Court.

RICHARD BLUMENTHAL
United States Attorney

Respectfully submitted,

DREW S. DAYS III United
Assistant Attorney General

Leigh M. Manasevit

THOMAS M. KEELING

LEIGH M. MANASEVIT

Attorneys

Department of Justice

Washington, D. C. 20530

CERTIFICATE OF SERVICE

I hereby certify that I have deposited in the United States mail, postage prepaid, two copies of the foregoing Brief of the United States addressed to each of the following counsel of record:

Michael J. Daly III,
50 Holmes Avenue
Waterbury, Connecticut 06710

Carl R. Cicchetti, Esquire
236 Grand Street
Waterbury, Connecticut 06702

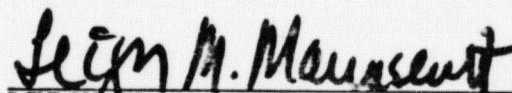
Ken Kimmerling, Esquire
Puerto Rican Legal Defense Fund
95 Madison Avenue
New York, New York 10016

Alice Bussiere, Esquire
New Haven Legal Assistance Assoc.
413 Howard Avenue
New Haven, Connecticut 06519

Joe Montwell, Esquire
Waterbury Legal Aid & Reference Service
61 Field Street
Waterbury, Connecticut 06702

Joseph Garrison, Esquire
Jonathan Silbert, Esquire
405 Orange Street
New Haven, Connecticut 06511

This the 24th day of August, 1977.



LEIGH M. MANASEVIT
Attorney
Department of Justice
Washington, D. C. 20530